No. 14-1520

IN THE

Supreme Court of the United States

STRYKER CORPORATION, STRYKER PUERTO RICO, LTD., AND STRYKER SALES CORPORATION,
Petitioners,

v.

ZIMMER, INC. AND ZIMMER SURGICAL, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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RULE 29.6 DISCLOSURE STATEMENT

Petitioner Stryker Corporation has no parent corporation, and no publicly held company owns ten percent or more of its stock.

Petitioner Stryker Puerto Rico, Ltd. is an indirect wholly-owned subsidiary of Stryker Corporation, which is a publicly held company that owns ten percent or more of Stryker Puerto Rico, Ltd.'s stock.

Petitioner Stryker Sales Corporation is a wholly-owned subsidiary of Stryker Corporation, which is a publicly held company that owns ten percent or more of Stryker Sales Corporation's stock.

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SUMMARY OF REPLY

As recognized by several *amici*, Stryker's petition raises important questions of law involving the growing tangle of restrictions that the Federal Circuit has imposed upon the statute authorizing enhanced damages awards for patent infringement. *See* 35 U.S.C. § 284. The increasingly stringent requirements to prove "objective willfulness" have caused enhanced damages awards to be overturned on appeal even in core cases like this one—cases involving blatant and knowing copying by direct competitors. These rigid restrictions have no foundation in the text of the statute, contravene this Court's most recent pronouncements about parallel provisions of the Patent Act, and undermine fundamental policies of patent law. Notwithstanding the various assertions made by Zimmer, the adjudged infringer in this case, Stryker's petition presents a clean opportunity for review of these important issues.

As an initial matter, Stryker, the Plaintiff-Appellee below, properly preserved its challenge to the grafting of willfulness onto § 284 and the correctness of the two-part test for willfulness set forth in *In re Seagate Technology, LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007), by raising those issues below in its petition for rehearing *en banc*. As the prevailing party prior to the Federal Circuit's reversal on willfulness, there was simply no reason for Stryker to raise those issues any sooner, particularly before a three-judge appellate panel that

would have had no power to overturn circuit precedent in the first place. Zimmer's waiver argument relies on a single statement twisted and taken out of context from one of Stryker's filings that itself contains a caveat refuting Zimmer's argument.

It has been eight years since the Federal Circuit's *Seagate* decision formally grafted a "willfulness" requirement onto § 284 in the form of a rigid, two-part test of which the dispositive, threshold criterion (the "objective prong") has nothing to do with willfulness as traditionally understood. *See id.* at 1368–71. Since then, the *Seagate* framework has become ever more stringent as a steady flow of rulings—such as the decision to review the objective prong of the *Seagate* test *de novo*—has carried patent remedies even further from their statutory moorings. *See Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc.*, 682 F.3d 1003, 1006–07 (Fed. Cir. 2012). Zimmer's protests notwithstanding, the *Seagate* framework has sufficiently matured over the past eight years, and there is no need for further "percolation" below, especially where the Federal Circuit is unlikely to reject a framework it initiated just eight years ago. Postponing review in this Court would only delay much-needed corrections to the Federal Circuit's § 284 jurisprudence, which runs contrary to this Court's earlier precedents involving § 284 and its very recent guidance regarding 35 U.S.C. § 285 in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), and *Highmark Inc. v. Allcare Health Management System, Inc.*, 134 S. Ct. 1744 (2014).

I. THIS CASE IS A PROPER VEHICLE FOR SUPREME COURT REVIEW OF THE IMPORTANT ISSUES RAISED IN STRYKER'S PETITION.

A. Stryker Properly Preserved All Issues Below.

In the face of the clear tension between the ever-growing barriers to enhanced damages erected by the Federal Circuit, on the one hand, and both the text of the Patent Act and this Court's most recent interpretations of it, on the other, Zimmer attempts to create a vehicle problem by suggesting that Stryker waived any right to challenge those barriers. Zimmer's claim is not supported by the record and is based on a misunderstanding of basic procedural principles.

There is no waiver. Stryker squarely raised all of the issues now before this Court in its petition to the Federal Circuit for rehearing *en banc*. *See* Stryker Pet. for Reh'g *En Banc* at 19, *Stryker Corp. v. Zimmer, Inc.*, No. 2013-1668 (Fed. Cir. Jan. 20, 2015), Dkt. No. 72 [hereinafter Pet. for Reh'g]. As the sole support for its waiver claim, Zimmer relies on a single phrase cherry-picked from the record, which neither means what Zimmer says it means nor has the effect Zimmer says it has.

Zimmer faults Stryker for failing to challenge the *Seagate* framework in its initial appellee briefing

to the Federal Circuit in Zimmer's appeal, but Zimmer's argument misunderstands the basic structure of appellate litigation. For a start, it would not have been possible for the original appellate panel to overrule the *Seagate* framework. *See Kam-Almaz v. United States*, 682 F.3d 1364, 1371 (Fed. Cir. 2012) ("Of course, a panel of this court is powerless to overrule a precedent."); *George E. Warren Corp. v. United States*, 341 F.3d 1348, 1351–52 (Fed. Cir. 2003) ("[T]o overrule a precedent, the court must rule en banc.").

More importantly, an appellee stands in very different footing from an appellant. As the Federal Circuit itself has explained:

> Appellees do not select the issues to be appealed. Appellees, in addition, are at a procedural disadvantage in appeals because they can neither file reply briefs nor choose when to appeal. The policies [of] avoidance of piecemeal litigation and conservation of judicial resources [ ] are less implicated when the party against whom waiver is asserted is the appellee. Indeed, these same policies may counsel for *not* forcing an appellee to raise all possible issues in an appeal.

Laitram Corp. v. NEC Corp., 115 F.3d 947, 954 (Fed. Cir. 1997) (emphasis in original).[1] Stryker preserved its challenge to the *Seagate* framework by raising those issues at its first opportunity to do so after a determination adverse to it had been made, in its *en banc* petition.

Moreover, it is important to understand the context of the material Zimmer cites in support of its waiver claim. On April 29, 2014, after Stryker and Zimmer had completed their original briefing to the Federal Circuit but well before oral argument, this Court decided *Octane Fitness* and *Highmark*. Shortly thereafter, Stryker filed a motion for leave to submit supplemental briefing on the implications of those cases on the level of deference in review of willfulness findings. Having prevailed at trial even under *Seagate*'s rigid test, Stryker at that point simply sought to preserve the status quo on appeal and had no reason to challenge the Federal Circuit's interpretation of § 284 or the *Seagate* framework. The standard of review was a unique matter, however, because it established the lens through which the status quo would be reviewed. Ultimately, the Federal Circuit denied Stryker's motion and declined to consider Stryker's proffered supplemental briefing.

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[1] For this reason, Zimmer's reliance on cases finding waiver or forfeiture by appellants, *see, e.g.*, *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008), is misplaced.

Zimmer now alleges waiver based on a single sentence, taken out of context, in Stryker's reply brief in support of its motion for leave to file supplemental briefing. There, Stryker stated that it "[did] not challenge on appeal the correctness of the two-prong, objective/subjective inquiry for willfulness set forth in [*Seagate*] *because Stryker prevailed on willfulness below even under the stringent standard set forth therein*." App. 182a (emphasis added). Read in its entirety, this statement merely clarified that Stryker was seeking in its supplemental brief to impress upon the court the importance of deference to the trial court's findings as the court proceeded with its consideration of Zimmer's appeal.

Stryker's statement quite obviously was something other than the blanket disclaimer Zimmer claims, given that (a) any challenge to *Seagate* would have required overruling binding circuit precedent; (b) Stryker was merely defending the judgment below; and (c) the statement was made in a motion seeking leave to file supplemental briefing on the limited subject of *Octane Fitness* and *Highmark* and their effect on appellate deference.

Much changed in the time since Stryker made this statement. Although the Federal Circuit affirmed on liability and damages, it reversed on willfulness and stripped Stryker of its enhanced damages award, prompting Stryker to file a petition for rehearing *en banc* at the Federal Circuit and its present petition before this Court. Once Stryker stood in an adverse posture in relation to the judgment, it challenged aspects of the Federal

Circuit's framework that it previously had no reason to oppose, including the Federal Circuit's interpretation of § 284 and the impropriety of the *Seagate* test. *See* Pet. for Reh'g at 19.

It is well understood that waiver does not apply when a prevailing party's fortune flips on appeal in this way merely because the party elected not to assert every possible ground for affirmance in the first instance. *See, e.g.*, *Independence Park Apartments v. United States*, 449 F.3d 1235, 1240 (Fed. Cir. 2006); *Stermel v. Workers' Comp. Appeal Bd.*, 103 A.3d 876, 882–83 (Pa. Commw. Ct. 2014); *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 603 (Tex. 2008); *NICOR Exploration Co. v. Fed. Energy Regulatory Comm'n*, 50 F.3d 1341, 1347 (5th Cir. 1995). It would be especially unfair to penalize Stryker now for *not challenging existing law in its appellee briefing* to the Federal Circuit when it prevailed under that law at the district court. Moreover, this Court did not decide *Octane Fitness* and *Highmark* until after all briefing was complete, so Stryker could not possibly have advanced those arguments in its initial filing.[2]

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[2] For all these reasons, the decisions of this Court cited by Zimmer are wholly inapposite. Those cases stand for the proposition that this Court will not consider issues that have been "*neither raised before* nor considered by the Court of Appeals." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (emphasis added); *see also Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998) (quoting *Adickes*); *Meyer v. Holley*, 537 U.S. 280, 291–92 (2003). Here, of course, Stryker *did* raise the very same issues involving grafting and *Seagate* in its

B. The *Seagate* Framework Is Mature And Ripe For Review.

In *Seagate*, the Federal Circuit "le[ft] it to future cases to further develop the application of [the] standard" articulated therein. 497 F.3d at 1371. In the eight years since *Seagate* was decided, those "future cases" have morphed the Federal Circuit's framework into a rigid, stringent test that has significantly undercut the deterrent effect of enhanced damages and flouted the plain language of § 284. Now, "willfulness" is less a measure of bad-faith infringement, and more an assessment of an infringer's (or his counsel's) ability to concoct objectively reasonable *post-hoc* defenses. *See, e.g.*, App. 21a-24a; *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1381–83 (Fed. Cir. 2014).

In any event, Stryker's petition presents pure questions of law and statutory interpretation that are ripe for review without further development below. The Federal Circuit has failed to act upon at least three recent opportunities to address these issues *en banc*. *See* App. 1a-2a (denying petition for rehearing *en banc*); *see also Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc.*, No. 2014-1114 (Fed. Cir. Apr. 8, 2015) (same); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 780 F.3d 1357, 1358 (Fed. Cir. 2015) (same). Indeed, the Federal Circuit has

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petition for rehearing *en banc* before the Federal Circuit, as Zimmer itself acknowledges. *See* Opp'n Br. at 6.

recently dug its heels in and applied its willfulness framework *more* rigidly. For example, in *Global Traffic Technologies LLC v. Morgan*, Nos. 2014-1537, 2014-1566, 2015 WL 3513416, at *7–8 (Fed. Cir. June 4, 2015), the Federal Circuit reversed the district court's enhanced damages award under § 284 after finding that the defendants presented objectively reasonable defenses below, even while acknowledging that those defenses had been devised solely for litigation. *Global Traffic* is another case, like this one, where the Federal Circuit's flawed willfulness framework allowed a knowing infringer to escape enhanced damages simply by hiring skilled counsel to devise *post-hoc* defenses. *See also Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, No. 2014-1492, 2015 WL 4639309, at *1, *12–15 (Fed. Cir. Aug. 4, 2015) (reversing willfulness and enhanced damages award where defendant presented objectively reasonable litigation defense, explaining that "the governing willfulness standard . . . does not require that [the defendant] have had a reasonable defense in mind when it committed its past infringement").[3] These decisions are a marked departure from the notion that an accused party must have *actually relied* on a reasonable defense at the time of infringement to

[3] Both the *Global Traffic* and *Carnegie Mellon University* decisions were authored by Federal Circuit judges who previously expressed an interest in revisiting the court's enhancement framework, casting doubt on Zimmer's suggestion that the Federal Circuit is likely to resolve the issues internally. *See* Opp'n Br. at 8–9. To the contrary, it suggests that guidance from this Court in the near term is necessary.

escape a willfulness finding. *Cf. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 n.20 (2007).

Given the increasing stringency of the Federal Circuit's willfulness jurisprudence, it has become extremely difficult, if not impossible, for patentees to prevail on willfulness and receive enhanced damages at the district court. District courts see the writing on the wall. Consequently, the pool of cases having the procedural posture of this case is drastically shrinking. And, because the Federal Circuit has exclusive jurisdiction over patent appeals, there is no forthcoming guidance from other courts. *Cf. Ariz. v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). Zimmer presents no compelling reason to give the Federal Circuit court any more chances to resolve these issues internally.[4]

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[4] The Federal Circuit panel below revised its original opinion by adding a footnote stating that the panel saw no need to consider the appropriate standard of appellate review in this case. *See* App. 22a n.6. Even if that cryptic statement is interpreted as an indication that the issue might be taken up in a future case, this petition challenges the grafting of willfulness onto § 284 and the underlying *Seagate* framework itself. It would make no sense to reformulate a standard of review when the underlying substantive standard is itself wrong.

II. ZIMMER'S ARGUMENTS ON THE MERITS ARE UNAVAILING.

A. Supreme Court Precedent Does Not Support *Seagate*'s Restrictions On Enhanced Damages.

This Court has never ruled that a finding of willfulness is required before a district court can award enhanced damages under § 284, notwithstanding Zimmer's assertions to the contrary. *See* Opp'n Br. at 16–17. The cases cited by Zimmer state only that a showing of willfulness is *sufficient* but not *necessary* to support enhanced damages. *See Seagate*, 497 F.3d at 1381 (Gajarsa, J., concurring) (noting the same and concluding that "[t]hose cases cannot be interpreted to mean that enhanced damages are limited to a finding of willfulness"); *Dowling v. United States*, 473 U.S. 207, 227 n.19 (1985) (identifying "treble damages for willful infringement" as one available remedy for patent owners); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 508 (1964) (explaining that a patentee "could in a case of willful or bad-faith infringement recover punitive or 'increased' damages under the statute's trebling provision"); *Seymour v. McCormick*, 57 U.S. 480, 489 (1853) (recognizing that "wanton or malicious" injury could support "vindictive or punitive damages" under the then-existing enhancement statute).

At any rate, *Seagate* and its progeny reflect a distorted concept of "willfulness." Prior to *Seagate*, willfulness was akin to culpable infringement and centered on subjective considerations. *See, e.g.*, *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1348 (Fed. Cir. 2004) (Dyk, J., concurring-in-part and dissenting-in-part) ("Punitive damages are awarded to punish reprehensible behavior, referred to in this context as willful infringement."); *Nat'l Presto Indus., Inc. v. W. Bend Co.*, 76 F.3d 1185, 1192–93 (Fed. Cir. 1996) ("Liability for willfulness of infringement turns on considerations of intent, state of mind, and culpability."). Under current Federal Circuit jurisprudence, "willfulness" no longer simply refers to malicious, bad-faith behavior, but instead includes a nebulous "objective" component. This Court has yet to provide guidance as to what actions constitute willful patent infringement. Accordingly, the cited cases do not refute Stryker's arguments on the merits.

B. *Octane Fitness* and *Highmark* Compel Changes To The Federal Circuit's Enhanced Damages Framework.

The lesson from this Court's decisions in *Octane Fitness* and *Highmark* is that the broad, discretionary language of § 284 must be taken at face value, especially where the language of § 284 is even *less* constrained than that of 35 U.S.C. § 285. *Compare* § 285 ("The court *in exceptional cases* may

award reasonable attorney fees to the prevailing party." (emphasis added)), *with* § 284 ("[T]he court may increase the damages up to three times the amount found or assessed."). The Federal Circuit's existing framework for enhancement, which is the same as the now-defunct framework for awarding attorneys' fees, *see iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1377 (Fed. Cir. 2011), simply cannot be reconciled with those decisions. Individual judges of the Federal Circuit and members of the patent bar agree. *See, e.g.*, *Halo*, 780 F.3d at 1362–64 (O'Malley, J., joined by Hughes, J., dissenting from denial of rehearing *en banc*); Nokia Br. at 12–15; Indep. Inventor Grps. Br. at 4.

The existing disparity between § 284 and § 285 is even more pronounced given that the same conduct is often considered for purposes of both exceptional case and enhanced damages. There is no principled reason why enhanced damages awards should be harder to attain or reviewed with greater scrutiny than attorneys' fee awards when premised on the same conduct, especially where § 284 features relatively *more* permissible language than § 285.

CONCLUSION

For the foregoing reasons and the reasons articulated in Stryker's petition, the petition for a writ of certiorari should be granted.